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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Revision of Part 22 and Part 90)
of the Commission's Rules to)
Facilitate Future Development of)
Paging Systems)

WT Docket No. 96-18

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

**REPLY COMMENTS OPPOSING THE COMMISSION'S PLANNED
RADICAL RESTRUCTURING OF THE PAGING INDUSTRY AND
RELATED CHANGES TO THE PAGING LICENSING PROCESS
AND
REQUEST FOR CLARIFICATION**

The Law Offices of Hill & Welch (Hill & Welch), hereby submit reply comments in the Federal Communications Commission's (Commission) captioned proceeding as permitted by the February 9, 1996 Notice of Proposed Rule Making (NPRM). In reply thereto, the following is respectfully submitted:

1) Hill & Welch is a communications law firm which, among other things, represents various paging companies before the Commission. On March 18, 1996 our office filed various comments on behalf of current, and future, paging licensees who are opposed to the Commission's plan to restructure the paging industry and to drastically alter the paging licensing process. Our clients are, for the most part, small businesses which would be harmed by

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adoption of the proposed rules. Our firm does not mass market paging applications¹ and our firm does not file applications for different clients specifying the same facilities.²

2) Our review of the comments submitted in this proceeding revealed an overwhelming opposition to the proposed artificial restructuring of the paging markets for the purpose of conducting frequency auctions. We take this opportunity to address comments which supported the proposed market restructuring and to request clarification of a portion of the NPRM.

3) **The FTC Comments Do Not Support Adoption of MTA Licensing and Auctions.** Initially, we shall address comments made by the Federal Trade Commission (FTC Comments).³ The gist of the FTC Comments is that the FTC

¹ Our firm does not mass market any applications for any of the Commission's services.

² We have always considered our paging practice to be a small, but enjoyable, one and we were surprised by the Commission's revelation that there are only 600 paging licensees in the country. Notice of Proposed Rule Making (NPRM), para. 7. Are we to conclude that our client list of just over 100 paging licensees means that our office represents a significant portion (15%-17%) of the paging industry? We assume that our numerous colleagues in the communications bar were similarly surprised by the extent of their representation.

³ At various places the FTC Comments refer to documents which are not attached to its pleading. For instance, in note 12 the FTC refers to several declarations filed in various enforcement actions; in note 13 the FTC refers to various "complaints" which should be reviewed; in note 17 the FTC refers to "Exhibits in Support of TRO;" in note 19 the FTC refers to a declaration submitted by Commission official David Furth; in note 29 the FTC refers to two letters sent to the FTC. It does not appear that these documents have been submitted in the instant proceeding and the Commission should ignore the FTC's references to extraneous documents.

believes that the proposed paging licensing procedures will help combat the plague of fraud that has been associated with the licensing of paging and other wireless technologies in the past. FTC Comments at 1.⁴

The FTC lists two basic types of telecommunications investment frauds associated with Commission licensing processes: license application mills and build-out schemes. FTC Comments at 4.

4) The FTC concludes that

the FCC's geographic licensing and competitive bidding proposal likely will inhibit paging application mill fraud. . . . An application mill is unlikely be able to "guarantee" licenses to its customers, eliminating a major selling point of the investment opportunity. Moreover, competitive pressures under the new rules make obtaining these licenses more costly for fraudulent telemarketers. For example, the FCC's proposal to require bidders to post upfront payments (§§ 104-105) and the winning bidders to post a 20% down payment (§ 106), will impose costs that fraudulent telemarketers may not wish to assume. FTC Comments at 8.⁵

5) The FTC's suggestion that auctioning will deter filing abuse is unfounded. First, the FTC Comments report that persons behind several application mills and build-out schemes are facing, or have faced, various aspects of the judicial/administrative processes based upon their activities. See FTC Comments at 2-4. Those telemarketers are already committing illegal acts. It is not at all clear why the Commission must adopt rules which threaten to ruin small businesses, which rules will merely be ignored by the

⁴ The FTC does not explain how the adoption of auction rules and MTA licensing in the paging industry would deter fraud in "other wireless technologies."

⁵ The FTC considers that these rules and transfer restrictions will reduce "build-out" fraud. FTC Comments at 12.

unscrupulous who have a demonstrated unwillingness to abide by current regulations.⁶

6) For instance, the FTC considers that new regulations will take away the ability of unscrupulous telemarketers to "guarantee" a license to a prospective patsy. FTC Comments at 8. It is not clear that auction rules and MTA licensing will deter the unscrupulous telemarketers from "guaranteeing" a license. First, it seems doubtful that the unscrupulous be concerned that he/she might not be able to deliver as promised. An unscrupulous telemarketer's "guarantee" is worthless and the adoption of new regulations will not make that "guarantee" any less worthless.

7) Second, "guarantee" is a slippery word. Perhaps the "guarantee" would require that the applicant meet all Commission licensing requirements. The suckered applicant will eventually learn that he/she has failed to meet a Commission licensing requirement, such as making the required upfront payment, down payment, and/or winning the license at the auction. The unscrupulous will not guarantee that the unwitting investor will meet those requirements.⁷

⁶ Indeed, the Commission was faced with abusive applications in its July 1994 Interactive Video and Data Services (IVDS) auction. See Order, FCC 94-222, released August 30, 1994. Thus, there is clear evidence that the auction process does not deter the filing of abusive applications.

⁷ The FTC thinks that there are too many licenses issued to individuals rather than to corporations, partnerships, etc. FTC Comments p. 8. We represent sole proprietors before the Commission who have operating systems. Historically, the paging industry has been a local activity operated by small businesses. It is not reasonably certain that the FTC's
(continued...)

8) As for upfront payments and down payments, the unscrupulous will either fail to mention such requirements, or present those requirements in such a way as to satisfy a notification requirement but to downplay the significance of the requirements. The FTC's suggestion that even more rules will deter fraud fails to give the "credit" due to unscrupulous telemarketers: they are very good at appearing to walk just inside the permissible line by weasel-wording regulatory requirements. Moreover, unscrupulous telemarketers who do not care which side of the line they are on will not be affected at all by any new rules. The proposed rules will not deter fraud, the proposed rules will only serve unnecessarily to keep small, legitimate businesses out of the paging industry.⁸

9) Of course, our law firm does not condone the unscrupulous who feed off unsuspecting persons who are susceptible to the lure

⁷(...continued)

concern has any merit; a study of system build-outs by individual applicants is required.

⁸ Perhaps the Commission should consider returning to a prior practice, namely, that only members of the Bar licensed to practice before the Commission could prepare and make filings before the Commission. Our experience, and the Commission's experience, is that to a very great extent the communications Bar is a dedicated group who are held to a higher standard than are telemarketers. While a very few lawyers do run afoul of the Commission's rules from time to time, those lawyers represent a minute part of the communications Bar and the Commission has shown an ability to deal with those problems. If a paging application is worth filing, it does not seem that the added, sometimes nominal, expense of filing through a law firm is of any consequence. We have not seen any infomercials sponsored by lawyers touting an 800/976 number and application filing possibilities.

of cold-calling scam artists. However, the FTC Comments make clear that there are rules in place to handle these situations. Unfortunately, the real problem is that there is always going to be a population which can get scammed, and there is always going to be a population all too willing to scam, regardless of the laws and regulations.⁹ The illusory goal of scam prevention is not a sufficient reason to put out of business the multitude of legitimate small paging companies by adoption of the proposed rules.

10) The FTC Comments paint with a wide brush and they seem to include lower paging bands among those purportedly subject to abusive application filings. The NPRM notes that

current licensing activity on the lower paging bands is confined largely to the addition of fill-in sites and minor expansion by existing licensees. Such activity suggests that there is relatively little desirable spectrum that remains available for licensing on these channels. NPRM at para. 13.

11) Thus, it appears that the Commission has correctly concluded that there is no abuse on the lower band paging channels. Most of the paging applications filed by our office involve systems seeking to expand existing services. Occasionally, our office files applications for new start-up companies who are referred to us by others in the industry. These new start-up companies are sincere because they have actively sought a way into the industry

⁹ Occasionally undersigned counsel receives calls at his office from telemarketers touting communications application filing possibilities. While I always ask for a prospectus, I have yet to receive one. I am curious why these telemarketers contact my law firm; I assume that they use an auto-dialer and are unaware that they are contacting a law firm, much less a law firm which specializes in communications law.

rather than being cold-called by a telemarketer. Because there does not seem to be any filing abuse on the lower paging bands, the FTC's proposed "remedy" addresses a non-existent problem and the "remedy" would only serve to drive legitimate small businesses out of the paging industry.

12) Finally, the FTC indicates that it "would welcome the opportunity to have its staff meet with the appropriate FCC personnel to discuss the issues raised in this comment." FTC Comments at 14. Please invite undersigned counsel to any such meeting. The FTC raises an important issue. However, the adoption of auction regulations and a drastic restructuring of an entire industry is not going to deter unscrupulous telemarketers or protect unwitting consumers. All that will be accomplished by adoption of the proposed rules is that legitimate, small businesses will unintentionally be driven out of the paging industry. If the Commission determines that current laws do not offer enough protection, a different approach to the problem must be formulated, such as the one proposed in footnote 8 above.

13) **Auction Method.** As noted by the NPRM at paragraph 13, mutual exclusivity is not a significant concern in the lower paging bands and a simple auction procedure would suffice on those relatively rare occasions when mutually exclusive situations arise between/among lower band paging applicants. Thus, the comments our office prepared for various of our clients suggested a sealed bid auction for the small number of mutually exclusive situations which arise in the lower paging bands. See, e.g., Comments Opposing The

Commission's Planned Radical Restructuring of the Paging Industry and Related Changes to the Paging Licensing Process, Metamora Telephone Company, at 6 n. 8. Our main purpose was to suggest a simple auction procedure.

14) However, the Comments of the Paging Coalition on Market Area Auction Proposal, at 16, and Comments of Ameritech Mobile Services, Inc. on Market Area Licensing Proposal at 14, make a worthy point that a single round auction may cause an existing licensee to pay an "extortion" payment to the government in order to secure the desired expansion site. A simple, multiple round auction does seem more appropriate under these circumstances. Auction methods to consider are telephonic bidding and oral bidding at the Commission's offices.

15) **Antitrust Issue.** As a final matter, we request that the Commission clarify paragraph 93 of the NPRM which states that

actual or potential competitors may not agree to divide territories horizontally in order to minimize competition, regardless of whether they split a market in which they both do business, or whether they merely reserve one market for one and another for the other.

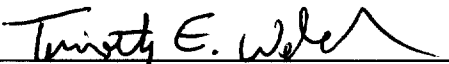
16) One method in which mutually exclusive paging application cases have been settled in the past is for applicants to agree to accept the other party's predicted interference so that both applications could be granted. This type of settlement arrangement effectively allows both applicants to serve the market for which it applied. The Commission should clarify that the above noted

antitrust statement does not mean imply that this traditional settlement mechanism is prohibited.¹⁰

WHEREFORE, in view of the information presented herein and in the initial comments, the Commission should not adopt its proposed rules.

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April 2, 1996

Respectfully submitted,


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Its Attorney

A copy of the foregoing Reply Comments has been sent to

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¹⁰ It is noted that the NPRM proposes that rural telephone companies may partition paging markets. NPRM at para. 136. Because the Commission on the one hand indicates that market divisions are improper, but on the other hand the Commission proposes a partitioning arrangement which horizontally divides markets, clarification of the Commission's antitrust concerns is required.